

## **REMARKS**

Claims 1 and 38 to 58 were pending on the March 26, 2009, notification date of the non-final Office Action. Claims 50 and 51 have been cancelled, without prejudice or disclaimer of subject matter. Claims 59 and 60 have been added. Claims 1, 52 and 53 are the independent claims. Reconsideration and further examination are requested.

### *Interview Summary*

The undersigned thanks Examiner Dunham for the courtesies extended during the personal interview conducted on April 21, 2009. In the interview, the new features added to the independent claims were discussed. Examiner Dunham agreed that these new features appeared to overcome the applied § 101 and § 102 rejections. All parties agreed that the interview aided the mutual understanding of the application and rejection, and generally advanced prosecution.

### *§ 101 Rejection*

Claims 1 and 38 to 51 were rejected under 35 U.S.C. § 101. Claims 50 and 51 were cancelled, without conceding the correctness of the rejection, and claim 1 was amended to further recite “one or more processors.” Furthermore, the Applicants have amended the specification as requested. Withdrawal of the § 101 rejection is requested.

### *Official Notice*

As provided for in MPEP § 2144.03, Official Notice unsupported by documentary evidence should only be taken by the Examiner “where the facts asserted to be well-known, or to be common knowledge in the art are capable of instant and unquestionable demonstration as being well-known.” More specifically, the notice of facts beyond the record which may be taken by the Examiner must be “capable of such instant and unquestionable demonstration as to defy dispute” (see *In re Ahlert*, 424 F.2d 1088, 1091, 165 USPQ 418, 420 (CCPA 1970), citing *In re Knapp Monarch Co.*, 296 F.2d 230, 132 USPQ 6 (CCPA 1961)). Further, the Examiner must provide specific factual findings predicated on sound technical and scientific reasoning to

support the conclusion of common knowledge (see *In re Soli*, 317 F.2d at 946, 37 USPQ at 801; *In re Chevenard*, 139 F.2d at 713, 60 USPQ at 241). Applicants respectfully note that the facts asserted to be well-known in the instant rejection are not capable of such instant and unquestionable demonstration as to defy dispute, and that the Examiner has not provided specific factual findings predicated on sound technical and scientific reasoning to support the conclusion of common knowledge.

In taking Official Notice, the Examiner has asserted that “it is old and well known at the time of applicant’s invention to have allowed an owner to specify whether customer feedback should be displayed on online channels such as auction sites” (see instant Office action at pp. 8-9). The Examiner’s assertions, however, lack the requisite specific factual findings predicated on sound technical and scientific reasoning. Instead, the Examiner has only recited the claim feature and asserted that is well known, taking the subject claim feature out of context. Moreover, the Applicants submit that the failure of the Examiner to find this feature in any one of the at least *forty-six* references of record is sufficient evidence that this feature is neither well known, nor capable of instant and unquestionable demonstration, as required.

For at least the foregoing reasons, the Official Notice set forth in the instant rejection is improper. Therefore reconsideration and withdrawal of the rejections are respectfully requested.

§§ 102 and 103 Rejections

Claims 1 and 38 to 43 and 45-58 were rejected under 35 U.S.C. § 102(e) over U.S. Patent App. Pub. No. 2005/0033648 (“Jin”); and claim 44 was rejected under 35 U.S.C. § 103(a) over Jin in view of Official Notice. Withdrawal of the §§ 102 and 103 rejections is requested.

Referring to particular claim language, independent claim 1 previously recited the feature that “the dashboard interface providing the calculated metrics and a recommendation of the third party facilitator,” and has been amended to recite the feature of “using the calculated metrics and historical transaction data to generate, by the third party facilitator, a recommendation for improving the performance of the transaction, the recommendation suggesting that an auction type, an auction duration period, a price, an ending time, or a quantity and type of items being sold should be adjusted to different values than were specified by the owner of the items, for any remaining portion of the transaction.” Claims 52 and 53 recite similar features.

The applied reference does not disclose, teach or suggest at least these features. With regard to the feature of providing the recommendation of the third party facilitator, the Office Action argues at page 9 that, in addition to a user created business logic, Jin provides for a “default logic.” The Applicants assume that the Office Action intends this “default logic” to correspond with the “recommendation of the third party facilitator,” as claimed.

The Applicants respectfully disagree, and note that this “default logic” is also user created business logic, provided by the user through various mechanisms including:

- in the product data (*see* Jin, ¶¶ [0039] (“default”), [0043] (“default quantity”)).
- through separate screen 36 (*see* Jin, ¶ [0060] (“There can be a separate screen 36 to capture this **default** information.”)).
- through page 46 (*see* Jin, ¶ [0092] (“the **customer** can control the following variables by static input (i.e., no logic need be used to derive the settings), at the SKU, category, and site level, using a business rules **default** page”).
- through item page 60 (*see* Jin, ¶ [0114] (“Referring also to FIG. 15, an edit item button 66 on the item page 60 can lead the **user** to an item edit page 70. ... The sales parameters can also include **default** auction durations, start prices and bid increments.”)).

Accordingly, it is not accurate to assert that the “default logic” of Jin is anything other than user-created logic, since Jin provides no other mechanism for its definition other than through direct input by the user. Since the “default logic” is also user-created logic, it cannot be “a recommendation of a third party facilitator.” For this reason, Jin does not describe the feature of “the dashboard interface providing the calculated metrics and the recommendation of the third party facilitator,” as claimed.

Nevertheless, in an effort to advance prosecution, the Applicants have amended the claims to recite the new feature of “using the calculated metrics and historical transaction data to generate, by the third party facilitator, a recommendation for improving the performance of the transaction, the recommendation suggesting that an auction type, an auction duration period, a price, an ending time, or a quantity and type of items being sold should be adjusted to different

values than were specified by the owner of the items, for any remaining portion of the transaction.” The Applicants submit that Jin also does not describe this feature.

Based on the these remarks, independent claims 1, 52, and 53 are allowable over the applied reference. The other rejected claims and new claims in the application are each dependent on these independent claims and are thus believed to be allowable over the applied reference for at least the same reasons.

With reference to claim 45, for example, even assuming *arguendo* that FIG. 3 of Jin did show an anchor price flag representing a cost of goods sold, which it does not, the Applicant maintains that “an anchor price flag representing a cost of good sold” is not the same as “an anchor price flag indicating **whether the anchor price represents** a Next Best Channel Alternative (NBA), a Cost Of Goods Sold (COGS), a Manufacturer’s Suggested Retail Price (MSRP), or a jobber price,” as actually claimed.

Similarly, in reference to claim 46, even assuming *arguendo* that FIG. 5 of Jin did show “an average sales price per SKU associated with each item,” which it again clearly does not, the Applicant also maintains that the Office Action has not addressed the feature that “the ASP per SKU is expressed as a percentage of the anchor price,” as is also recited by claim 46.

Furthermore, the Applicants have analyzed the rejections of dependent claims 38 to 40, 43, 44, 47 and 48, and have amended these claims to further distinguish them from the cited passages of Jin. Because each claim is deemed to define additional aspects of the disclosure, however, the individual consideration of each claim on its own merits is respectfully requested.

The absence of a reply to a specific rejection, objection, issue, or comment, including the Office Action’s characterizations of the reference, does not signify agreement with or concession of that rejection, issue, or comment. In addition, because the arguments made above may not be exhaustive, there may be reasons for patentability of any or all pending claims that have not been expressed. Finally, nothing in this paper should be construed as an intent to concede any issue with regard to any claim, except as specifically stated in this paper, and the amendment or cancellation of any claim does not necessarily signify concession of unpatentability of the claim prior to its amendment or cancellation. Since the amendments made herein have been made solely in an effort to expedite advancement of this case, the Applicants reserve the right to prosecute the rejected claims in further prosecution of this or related applications.

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No other matters being raised, it is believed that the entire application is fully in condition for allowance and such action is courteously solicited.

Please apply any charges or credits to deposit account 06-1050.

Respectfully submitted,

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